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No. 535

In the Supreme Court of the United States

OCTOBER TERM, 1946

THEODORE MARTIN SUNAL, PETITIONER

v.

DAVID R. LARGE, SUPERINTENDENT, FEDERAL PRISON CAMP, MILL POINT, WEST VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute and Regulations Involved	2
Statement	3
Argument	13
Conclusion	22

CITATIONS

Cases:

Chin Yow v. *United States*, 208 U. S. 8	19
Collins v. *Johnston*, 237 U. S. 502	15
Estep v. *United States*, 327 U. S. 114	13, 15, 17, 18
Mahler v. *Eby*, 264 U. S. 32	16
Nishimura Ekiu v. *United States*, 142 U. S. 651	16
Rea v. *McDonald*, 153 F. 2d 190, certiorari denied March 25, 1946	17
Smith v. *United States*, No. 534, this Term	21
Trainin, United States ex rel. v. *Cain*, 144 F. 2d 944, certiorari denied, 323 U. S. 795	20
United States v. *Stalter*, 151 F. (2d) 633	21

Statute and Regulations:

Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 305), Sec. 5 (d)	2
28 U. S. C. 461	17
Selective Service Regulations, Sec. 622.44	2

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OPINION BELOW

The opinion of the circuit court of appeals (R. 102–118) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered July 29, 1946 (R. 118–119). The petition for a writ of certiorari was filed September 25, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

At his criminal trial for refusing to submit to induction, petitioner's tendered defense of illegal classification was rejected. After conviction, petitioner initiated the present habeas corpus proceeding challenging the jurisdiction of the convicting court and the legality of his selective service classification. The principal questions presented are:

1. Whether the habeas corpus court erred in undertaking to determine the validity of the defense tendered at the criminal trial.

2. Whether there is foundation in fact for the selective service boards' refusals to classify petitioner as a minister of religion.

STATUTE AND REGULATIONS INVOLVED

Section 5 of the Selective Training and Service Act of 1940, 54 Stat. 885 (50 U. S. C. App. 305), provides in part:

> (d) Regular or duly ordained ministers of religion, * * * shall be exempt from training and service (but not from registration) under this Act.

The Selective Service Regulations provide in part:

> 622.44 *Class IV–D: Minister of religion or divinity student.* (a) In Class IV–D shall be placed any registrant:
>
> * * * * * *
>
> (2) Who is a duly ordained minister of religion, or
>
> * * * * * *

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties. (9 F. R. 5202.)

STATEMENT

On March 11, 1946, Rudolph J. Sunal filed a petition for a writ of habeas corpus in the District Court for the Southern District of West Virginia on behalf of his brother, Theodore Martin Sunal, hereinafter referred to as petitioner, who was in respondent's custody. Briefly, the petition alleged that on March 22, 1945, petitioner was convicted in the District Court for the Western District of Pennsylvania of refusing to submit to induction, in violation of Section 11 of the Selective Training and Service Act, and was sentenced to imprisonment for five years. The petition alleged that this judgment was void (1) because petitioner was illegally denied classification as a duly ordained minister of religion, and the induction order and subsequent judicial proceedings were therefore void, and (2) because the convicting court denied him the opportunity to prove "any substantial defense" to the indictment by excluding evidence which he proffered, which was calculated to show that he was a min-

ister of religion (R. 1–19). The writ issued (R. 20), respondent filed an answer (R. 23–27), and a hearing was had, at which petitioner's selective service file was introduced. At the hearing, it was stipulated (R. 86–88), *inter alia,* that at the trial of the criminal case petitioner "attempted to offer de novo evidence as to his activity, background and training as a minister and also upon the trial attempted to offer into evidence the entire Draft Board file"; that this evidence was rejected by the convicting court on the theory that the jury could not inquire into the validity of the selective service classification or into the question whether petitioner was a minister of religion, and the court instructed the jury that these issues were not open for their consideration; and that petitioner did not appeal his conviction.

The pertinent facts relating to petitioner's selective service classification, as revealed by the information in his selective service file, may be summarized as follows:

Petitioner registered under the Selective Training and Service Act with Local Board No. 26, Pittsburgh, Pennsylvania, and on January 15, 1941, he filed his selective service questionnaire (R. 28–33). In answer to Series IV (R. 28–29) of the questionnaire[1] concerning his "occupation

[1] In Series III (R. 28), petitioner stated that his education consisted of four years of elementary school and four years of high school.

A letter dated February 2, 1942, from the local board to the Acting Director of Selective Service for Pennsylvania states that petitioner was born November 8, 1916.

or activity," he stated that he worked as an "automotive carburetor and electrical mechanic"; that he had performed this work for six years; that his average weekly earnings were $25; that he was employed by the "Bendix-Westinghouse Automotive Air Brake Co."; that he was not engaged in any other business or work; that he was not licensed in any trade or profession; and that there were no other facts concerning his occupation which were pertinent to determining his selective service classification. In Series V, he stated that during the previous five years he had no occupational experience other than the described job, and in Series VII (R. 29–30), he claimed his parents as dependents. Series VIII (R. 30) relates to "Minister, or Student preparing for the ministry" and provides space for a detailed explanation of any claim to exemption on this ground; petitioner stated, "I am not a minister of religion" and did not fill in any of the remaining spaces in this part of the questionnaire. In Series X (R. 31), petitioner claimed exemption from both combatant and noncombatant military service on the ground that he was a conscientious objector, and he requested classification in Class "IV," which is described in the questionnaire as the classification for those whose induction is deferred by law.

In support of his claim to exemption from military service as a conscientious objector, petitioner filed the special form provided for registrants making such claims. In that document (R. 34–37) he stated, *inter alia*, that "From childhood, through parental guidance have I been taught the necessary steps for true christianity. The bible used as the source of all training"; that under no circumstances did he believe in aggressive force; that he gave public expression to his views in that "as one of Jehovah's witnesses I have partaken in door to door testimony service, presenting the gospel message to those who cared to hear * * *"; and that since 1934, his only occupation, position, job, or type of work, whether compensated or not, was "mechanical." In describing his religious affiliation, petitioner stated that "I have been raised from childhood as one of Jehovah's witnesses"; that the "church, congregation, or meeting" where he customarily attended was "Kingdom Hall, 907 Middle Street, Pittsburgh"; that the pastor or leader of this religious group was Mr. Joseph Petti; that Jehovah's Witnesses have no creed in respect of participation in war, "sole responsibility being upon individual and his devotion to written law of God"; and that he was a member of the AFL Mechanics Union.

On the basis of this information, the local board on May 10, 1941, classified petitioner I–A

(available for military service) (R. 31). On May 15, 1941, petitioner for the first time claimed classification as a minister of religion. He appeared before the board on that date and submitted a letter in which he asserted that he was an "associate minister to the Allegheny Company of Jehovah's Witnesses" and requested classification in IV–D.[2] The letter was accompanied by documents, including an affidavit of Petti, the leader of the Allegheny Company, to the effect that petitioner had been a regular minister of religion since 1935. The board's minutes (R. 32) reflect that it considered the new information submitted by petitioner and on June 24, 1941, "declined deferment as a minister because it does not believe the registrant's status comes within the purpose and intent of the Selective Service Act regarding ministers" (see also R. 38).[3]

Thereafter, on July 8, 1941, petitioner had another hearing before the local board. A summary of that hearing, evidently prepared by the board, recites that—

> He added very little to the previous evidence regarding his being a minister of christianity. He stated he has no regular

[2] The letter is not reproduced in the printed record, but it is contained in the selective service file which, pursuant to stipulation (R. 120), is before this Court in its original form.

[3] In respect of petitioner's claim that he was a conscientious objector, the minutes state, "The question is referred to the Appeal Board or Department of Justice" (R. 32).

> church or institution where he preaches, but goes from house to house in the evening to preach their doctrines. He receives absolutely no salary or remuneration for this, and depends entirely on his secular job to support himself. (R. 39.)

Petitioner appealed from the local board's I–A classification (R. 31), and on July 10, 1941, he wrote another letter (R. 39–40) to the local board, requesting that it be attached to his questionnaire. He stated in this letter that his position as a minister was based upon training by his parents, and "correspondence instruction publications of the Watch Tower Bible and Tract Society of New York"; that "I have always when opportune, served as a field publisher, active ministry from door to door"; that "I also serve as assistant to the Treasurer of the Allegheny unit of Jehovah's witnesses. Also retaining the capacity of Study Conductor for a specified area of the Allegheny company." On December 28, 1941, petitioner addressed a letter (R. 42–44) to the board of appeal explaining that when he filed his questionnaire with the local board in January 1941, he stated in answer to the questions in Series VIII that he was not a minister of religion because he regarded himself, instead, as a "minister of Christianity." The letter further stated that he had been formally ordained, had been a minister of the Allegheny company, and did cus-

tomarily serve as a minister of Christianity.[4] The board of appeal on January 27, 1942, classified petitioner IV–E, as a conscientious objector (R. 31).[5]

Thereafter, in a letter dated January 31, 1942, to the Director of Selective Service for Pennsylvania,[6] petitioner stated that because of his religious beliefs he would not serve in a "'C. O. camp'' and that he should be classified as a minister of religion. The State Director examined petitioner's selective service file and declined to interfere with the classification because the facts did not warrant such action.[7]

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[4] The letter did not explain, however, why petitioner failed to state in his questionnaire that he was a minister of Christianity, either in appropriate spaces provided for a description of his occupation or activities as a basis for classification, or in the space provided at the end of the questionnaire for other facts material to determining his classification.

[5] In doing so the board accepted the recommendation of the Department of Justice hearing officer who had conducted a hearing on petitioner's claim that he was a conscientious objector. At the hearing before the hearing officer, petitioner adduced numerous affidavits from other Jehovah's Witnesses to the effect that he had been affiliated with the sect for a number of years, or that he was a minister, or that his reputation for honesty and integrity was good. The hearing officer's report is included in petitioner's selective service file.

[6] The letter is contained in petitioner's selective service file.

[7] See the State Director's letter of February 26, 1942, contained in the selective service file. National Headquarters of the Selective Service System reached a similar conclusion,

Petitioner was subsequently ordered to report to his local board for work of national importance, and he refused to do so. On May 19, 1942, he was convicted on account of this violation of the Selective Training and Service Act and sentenced to imprisonment for two years and to pay a fine of $100. He was released from prison on December 6, 1943. (See R. 76.)

Upon his discharge from prison, petitioner renewed his claim to classification as a minister of religion, but he submitted no new evidence at that time (see R. 45–46). On May 19, 1944, the local board classified him I–A (R. 32). Petitioner appeared at the office of the board on May 26, 1944, and requested a hearing before the board (R. 48–49). It appears from a summary, evidently prepared by the board's clerk, that petitioner said at that time that he was working four hours each day as an automobile mechanic and devoted the remainder of his time, approximately 150 hours a month, "to the ministry" (R. 48). Petitioner was given a hearing before the board on June 9, 1944 (R. 32, 50), at which time he presented a

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pointing out in a letter of April 20, 1942, to the State Director that "this registrant's name is not on the certified list of Jehovah's Witnesses on file in this Headquarters and there is nothing in the correspondence [from petitioner] which would indicate that the registrant has been improperly classified or which would warrant an investigation to determine the circumstances surrounding the registrant's classification."

letter[8] stating that "I have publicly symbolized my consecration to do God's will by water immersion in 1935"; that upon his release from imprisonment he was designated a "Pioneer" by the Watch Tower Bible and Tract Society, which meant that he was required to devote 150 hours each month to Jehovah's Witnesses' work; that that work consisted of going from house to house and conducting Bible studies, for which he received no remuneration; that he had been trained for the work by his parents and in Watch Tower Bible schools; that he was "an ardent student of the Watch Tower Magazine"; and that "by reason of being an ordained minister I can perform and preach funeral services, marriage ceremonies, immersion (baptismal) discourses." The letter was accompanied by numerous affidavits of other Jehovah's Witnesses, all to the effect that petitioner was a minister. On June 12, 1944, petitioner submitted another letter and supporting documents, in the same vein as those submitted on June 9 (R. 51–65).[9]

The local board's minute of June 23, 1944, states that "after Hearing on June 9, 1944 and after due consideration of facts presented Board sees no change in status of registrant than it was

[8] The letter of June 9, 1944, to the local board is contained in the selective service file.

[9] Petitioner's letter of June 12, 1944, is contained in the selective service file.

when classified by appeal Board on 7/29/41"; petitioner was accordingly classified I–A (R. 32).

On July 1, 1944, petitioner took an appeal and submitted a letter to the board of appeal outlining the respects in which he believed the local board erred (R. 67–69). In this letter he stated that he devoted 150 hours a month to Jehovah's Witnesses' activity, 120 hours to his secular job, and his remaining time to assisting his parents operate their farm. On August 31, 1944, the board of appeal, by a vote of 4–0, classified petitioner in I–A (R. 33).

On October 18, 1944, petitioner submitted further information, mostly cumulative of information already before the local board. The board concluded that it did not warrant reopening the classification (R. 82). Petitioner thereafter urged the state and national directors of Selective Service to intercede on his behalf, but they found no basis for doing so (see R. 78–79). He was ordered to report for induction on October 25, 1944, and he reported, but refused to submit to induction, informing the officials at the induction station that he should have been classified as a minister of religion (see R. 80–81). His conviction in March 1945 followed (see p. 4, *supra*).

The district court below concluded (R. 86) that habeas corpus is an available remedy to inquire into the legality of petitioner's selective service classification; and the court found as a fact (R.

96) that "the record of the petitioner made before his draft boards, filed as part of the evidence in this proceeding, contains evidence upon which the draft boards were justified in placing petitioner in Class I–A, as aforesaid, and denying his claim to the ministerial classification." Accordingly, the writ was discharged (R. 98–99), but petitioner was released from respondent's custody on bail pending appeal (R. 94, 99). Upon appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment was affirmed (R. 118–119).

ARGUMENT

In *Estep* v. *United States*, 327 U. S. 114, 124, this Court said that if, upon a trial for refusing to submit to induction, a registrant could not defend "* * * on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by *habeas corpus*." In this case, petitioner's tendered defense of illegal classification was rejected by the convicting court; and the court below, relying on the *Estep* opinion, held that petitioner was entitled to a writ of habeas corpus to inquire into the question whether the local board acted beyond its jurisdiction in ordering him to report for induction pursuant to his I–A classification. The evidence which petitioner tendered in the convicting court was reviewed by

the habeas corpus court and by the court below on appeal, and both courts concluded that petitioner failed to sustain his burden of showing that the local board lacked jurisdiction. It was for this reason that the writ was discharged.

Petitioner's contentions in this Court are twofold. He urges (Pet. 13–27) that the habeas corpus court should have limited its inquiry to a determination whether his proffered defense was rejected at the criminal trial and should not have examined the administrative record to determine whether there was a basis in fact for petitioner's classification. His second, and alternative, argument (Pet. 28–33) is that, in any event, the courts below erred in their conclusion that selective service boards were justified in denying his claim to classification as a minister of religion. Granting for purposes of argument that habeas corpus is available to petitioner in the circumstances of this case, we think that petitioner is mistaken in both respects.

1. *The scope of the habeas corpus inquiry.*—We think the circuit court of appeals (R. 111–112) was correct in holding that where habeas corpus is available, the habeas corpus court must determine whether the registrant's local board lacked jurisdiction to order him to submit to induction. The Government's arguments in support of this view, and the supporting judicial decisions, are fully stated in the opinion of the

court below (see R. 108–112; see also R. 103–108), and we shall not undertake to restate them here.

We think it is sufficient to point out, additionally, that petitioner's argument completely overlooks the fact that this Court said in the *Estep* case, 327 U. S. at 124, that where, as here, a proffered defense of illegal classification is rejected at the criminal trial, habeas corpus after conviction for refusal to submit to induction is available "to challenge the jurisdiction of the local board." Quite plainly, the habeas corpus court can decide such a challenge only by examining the administrative record and any other pertinent evidence for the purpose of determining whether there is a basis in fact for the classification or whether the local board departed from the selective service regulations in any substantial respect. Petitioner's view that the habeas corpus court should determine only whether the tendered defense was excluded at the criminal trial, without considering the merits of the defense, finds no support in what this Court said in the *Estep* decision, and it is directly contrary to the action of this Court in an analogous situation in *Collins* v. *Johnston*, 237 U. S. 502, 506–507. In that case a petition for a writ of habeas corpus was predicated on the claim that the petitioner, who had been convicted of perjury, was deprived of due process because the convicting

court refused to consider "a valid and legally conclusive defense," viz., that the false testimony upon which the charge of perjury was based was not material to the trial at which it was given. This Court held that the petition for a writ of habeas corpus was properly denied without a hearing, because it appeared on the face of the petition that the petitioner was not entitled to the writ. But the Court also considered the merits of the claimed defense and concluded that the petitioner had not shown that his perjury related to an immaterial matter. In this case, we think the courts below properly did the same thing by considering whether the evidence upon which petitioner relies shows that his local board lacked jurisdiction in the premises. Cf. *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 662; *Mahler* v. *Eby*, 264 U. S. 32, 42–43.

The position of the courts below is supported as well by strong practical considerations. It is of little practical value for a habeas corpus court to invalidate a judgment of conviction and require that the prisoner be retried if, upon the retrial, he will be unable to show that he was illegally classified. The course dictated by the decision below, on the other hand, terminates the litigation. If the habeas corpus court finds that the registrant's local board exceeded its jurisdiction, the conviction is voided, he is released from imprisonment under it, and there is no occasion

for a retrial; he is not released merely for a new trial at which, if convicted, he will receive a new sentence, possibly receiving no credit for the time served under the first sentence. If, on the other hand, the court finds against the registrant, he remains in custody to complete service of his sentence. In our view the procedure followed by the courts below in inquiring into the jurisdiction of petitioner's local board protects the interests of both petitioner and the Government, and truly permits the habeas corpus court to dispose of the case as, in the words of the habeas corpus statute (28 U. S. C. 461), "law and justice require." [10]

[10] Petitioner suggests (Pet. 10), as a reason for granting certiorari, that the decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Rea* v. *McDonald*, 153 F. 2d 190, certiorari denied, March 25, 1946, holding that in circumstances similar to those in the present case, habeas corpus would not lie, notwithstanding that the convicting court refused to allow a proffered defense that the selective service classification was illegal. It is true that the decisions are directly in conflict, but we have serious doubts whether the conflict requires resolution by this Court, for the *Rea* case was decided prior to the *Estep* decision. The decision below followed the *Estep* decision and is predicated on what this Court said in that case. Unless the court below has misconstrued the dictum of this Court concerning the availability of habeas corpus after conviction in cases of refusal to submit to induction, we think that there is no necessity for resolving the conflict of decisions. This is particularly so in this case, for petitioner has been accorded habeas corpus review; he plainly does not urge that the court below should have followed the *Rea* decision.

2. *The validity of petitioner's classification.*— Petitioner does not contend that he was denied any procedural rights in the classification process. His sole claim is that on the evidence before the classifying boards he should have been classified IV-D. To sustain this contention, petitioner bore the burden of establishing that there is no foundation in fact for the refusal of the selective service boards to classify him as a minister of religion. *Estep* v. *United States*, 327 U. S. 114, 122–123. Both courts below held—correctly, we think—that he failed to sustain this burden.

The information which was before the board of appeal when it finally classified petitioner is summarized at pp. 4–12, *supra*. Briefly it shows that in August 1944, petitioner was a trained mechanic who had worked at that trade since 1934 and was at the time devoting about 120 hours a month to such work, in addition to assisting in the operation of his parents' farm. His education consisted of four years of elementary school and four years of high school. Since 1935, he had been actively affiliated with the Allegheny company of Jehovah's Witnesses. His religious training consisted of instruction from his parents and of reading documents issued by the Watchtower Society. Petitioner's religious leader in the Allegheny unit of Jehovah's Witnesses was one Joseph Petti, who apparently was in charge of the unit. As a member of Jehovah's Witnesses, petitioner's re-

ligious activities consisted principally of going from house to house preaching and distributing literature of the sect. He had no church and he received no remuneration for his services. In 1944, he claimed he was devoting approximately 150 hours each month to these activities.

Accepting petitioner's evidence as true, which the classifying board was not required to do "even though no contrary or impeaching testimony was adduced" (*Chin Yow* v. *United States*, 208 U. S. 8, 11–12), we think it fails completely to show that he stands in the same relationship to the Allegheny unit of Jehovah's Witnesses, with which he is affiliated, as do ministers of other religious faiths to their congregations. Indeed, it affirmatively appears from petitioner's evidence that he regarded one Joseph Petti as his pastor or religious leader. While the evidence shows that petitioner believes in the doctrines and practices of Jehovah's Witnesses and is a willing worker in behalf of the sect, it does not show that he devotes his life to the furtherance of their beliefs. His most active participation in religious work has not at any time averaged more than approximately five hours a day. Prior to his first conviction, it necessarily was considerably less, for he then held a full-time job as a mechanic.

Similarly, there is no evidence that petitioner performs the functions which are customarily performed by regular or duly ordained ministers

of other religions. Nor is there any evidence that he is the religious leader of the Allegheny unit of Jehovah's Witnesses, that he leads them in worship, that he, in fact, marries the young or buries the dead, or that he performs any of the functions which are customarily associated with ministers of religion. At best, his evidence shows that he, like other members of the Jehovah's Witnesses sect, practices his religious beliefs by "witnessing" from house to house. It does not show any distinction in function or status between petitioner and the other members of the Allegheny unit. He is not their religious leader and he evidently possesses no authority over their activities. Like other Jehovah's Witnesses, he devoutly practices his religion, but that is all.

Unless it can be said that all Jehovah's Witnesses are ministers of religion within the meaning of the Selective Training and Service Act and the regulations, petitioner's board of appeal had ample basis for denying him classification as a minister. It seems plain that Congress did not intend, in Section 5 (d), to exempt an entire religious sect from service under the Act. As the Circuit Court of Appeals for the Second Circuit said in *United States ex rel. Trainin* v. *Cain*, 144 F. 2d 944, 949, certiorari denied, 323 U. S. 795:

> * * * Unlike the exemption for conscientious objectors of § 5 (g) of the Act, which was granted to meet the personal convictions of certain of the registrants, see

> United States ex rel. Phillips v. Downer, supra, and which is only from combatant service, the absolute exemption of "regular or duly ordained ministers of religion" contained in § 5 (d) seems more a recognition of the public need for spiritual guidance than a mere individual privilege. Thus, ministers of religion are relieved of the duty of service not so much for their personal religious training and beliefs, but for the disruption of public worship and religious solace to the people at large which would be caused by their induction. * * *

If, as the Director of Selective Service has determined (see p. 19 of our brief in opposition in *Smith* v. *United States*, No. 534, this Term), and, as we think, only those members of the Jehovah's Witnesses sect who are comparable in status and function to ministers of other religious faiths are entitled to exemption from military service, there can be no question, as the courts below found, that petitioner was properly denied classification as a minister of religion.[11]

[11] Petitioner urges (Pet. 11, 32) that this case is substantially the same on its facts as *United States* v. *Stalter*, 151 F. 2d 633 (C. C. A. 7), where the court concluded that the registrant was improperly denied classification in IV-D. We think that decision is open to serious question, since it nowhere appeared from the facts that the registrant stood in the same relationship to other Jehovah's Witnesses as does a minister in other religious sects to his congregation. Significantly, the court disagreed with the petitioner's view that all Jehovah's Witnesses are ministers and are thus exempt from military service (151 F. 2d at 637). The Circuit Court

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1946.

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of Appeals for the Seventh Circuit found that the registrant devoted his "full time to ministerial work" and that he therefore should have been classified as a minister. The most favorable evidence for petitioner in this case shows that at the time of his final classification he was a mechanic who, as a member of Jehovah's Witnesses, practiced his religion by witnessing from house to house for a few hours a day, as do other members of the sect.

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